

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WUPW Broadcasting, LLC)	
)	CSR-7853-N
Petition For Waiver of Section 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2010

Released: March 18, 2010

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. WUPW Broadcasting, LLC, licensee of television broadcast station WUPW (FOX), Toledo, Ohio ("WUPW"), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication rules ("exclusivity rules").¹ Specifically, WUPW seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against television broadcast station WJBK (FOX), Detroit, Michigan ("WJBK") in the city of Toledo, Ohio.² An opposition to this petition was filed on behalf of Buckeye Cablevision, Inc. ("Buckeye"), operator of the cable system serving Toledo, Ohio. WUPW filed a reply to this opposition. For the reasons discussed below, we grant WUPW's waiver request.³

¹47 C.F.R. §§ 76.92(f). Although not expressly requested in WUPW's petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Section 76.122(j) (significantly viewed exception to satellite network nonduplication) would also appertain to a waiver for carriage on DBS systems based on the same showing that a station is no longer significantly viewed in the relevant community. See 47 C.F.R. §§ 76.92(f), and 76.122(j). See 47 U.S.C. §§ 340(a)(2) and 340(c). We note that, initially, WUPW also requested a waiver of the syndicated exclusivity rules with regard to WJBK, but withdrew that request in its reply to Buckeye's opposition, noting that it did not have such rights. See Reply at 2 n.2.

²Petition at 1.

³We note that because Buckeye's technically-integrated cable system serves communities located in both the Toledo DMA and the Detroit DMA, the commercial television stations of both markets would be considered must carry stations. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2975-76 (1993) ("Must Carry Order"), the Commission stated that "in situations where a cable system serves a community or communities in more than one county and those counties are assigned to different [DMAs], the cable operator must carry all of the local commercial television signals in both [DMAs] (subject to the statutory safeguards provided for in the Act, e.g., the limitations on one-third

(continued...)

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.⁴ Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the network nonduplication rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").⁵ The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.⁶

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁷ that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission's rules. Section 76.5(i) requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.⁸ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.⁹ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁰

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."¹¹ Over time, The Nielsen

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of usable channel capacity, the substantial duplication limitation, the closest network affiliation limitation, etc.), unless the cable operator can segregate their carriage on its systems. In this instance, Buckeye maintains it cannot separate its technically-integrated system. See 47 C.F.R. § 76.56.

⁴See 47 C.F.R. § 76.92; 47 C.F.R. § 76.101.

⁵ 47 C.F.R. § 76.92(f); see 47 C.F.R. §§ 76.5(i) and 76.54.

⁶ 47 C.F.R. § 76.106(a).

⁷103 FCC 2d 407 (1986).

⁸47 C.F.R. § 76.5(i).

⁹ *Id.*

¹⁰See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹¹47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

Company (“Nielsen”) became the primary surveying organization through which a petitioner could obtain television surveys.¹² Nielsen, which routinely surveys television markets to obtain television stations’ viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July and November “sweep periods”). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹³ Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁴ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percentage of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁵ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the data that it collects from over-the-air households for its routine audience sweep periods, selecting in-tab diaries from its database from the area served by a cable system or an individual cable community.¹⁶ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data, pursuant to the requirements set forth in Section 76.54(c) of the Commission’s rules.¹⁷ Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (*e.g.*, a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.¹⁸

¹²The Nielsen Company was previously known as Nielsen Media Research.

¹³Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹⁴It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁵47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

¹⁶We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was obtained from Nielsen. See *e.g.*, *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

¹⁷47 C.F.R. § 76.54(c). Section 76.54(c) states that “[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period.”

¹⁸*Id.*

Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁹ A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. WUPW seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication rights against television broadcast station WJBK for the City of Toledo, Ohio.²⁰ WJBK is considered to be significantly viewed in Lucas County, Ohio, where Toledo is located.²¹

6. WUPW states that it is licensed to Toledo, Ohio, a community located in the Toledo, Ohio designated market area (“DMA”), while WJBK is licensed to a community located in the Detroit, Michigan DMA.²² WUPW argues that it would normally be entitled to assert exclusivity protection against WJBK in Toledo, but cannot because WJBK is considered significantly viewed in Lucas County, Ohio, where Toledo is located.²³ WUPW maintains, however, that WJBK no longer meets the significantly viewed standard in Toledo and, as proof, it submits the results of a special community-specific survey conducted by Nielsen.²⁴ WUPW states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes located in the zip codes identified for Toledo.²⁵ The submitted data are for two four-week survey periods in each of two years. The first year’s survey audience estimates were derived from May 2006 and November 2006 audience sweep data, combined, and the second year’s estimates from the May 2007 and November 2007 audience sweep data, combined.²⁶ These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules.²⁷ WUPW states that for WJBK’s share of total viewing hours in over-the-air homes in Toledo falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

¹⁹Section 76.54(b) states that “[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level.”

²⁰Petition at 1.

²¹*Id.* at 2 n.5.

²²*Id.* at 3.

²³*Id.* at 2 n.5. WUPW states that WJBK achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

²⁴*Id.* at Exhibit 1.

²⁵*Id.* Nielsen defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See Nielsen Company at <http://www.nielsenmedia.com/glossary/>.

²⁶*Id.*

²⁷47 C.F.R. § 76.54(b).

TABLE 1 – VIEWING IN TOLEDO, OHIO

<u>Survey Year</u> ²⁸	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
May 2006/ Nov. 2006	86	0.038	0.038	0.73	0.74
May 2007/ Nov. 2007	79	0.00	0.00	0.00	0.00

As a result, WUPW requests that the Commission grant its petition so that it can assert its exclusivity rights in Toledo, Ohio.

7. In opposition, Buckeye argues WUPW's waiver request is an effort to force Buckeye to delete WJBK from the Toledo portion of its integrated Toledo metropolitan area cable television system serving Lucas and Wood Counties, Ohio and Lenawee and Monroe Counties, Michigan.²⁹ Buckeye maintains that this would eliminate an over-the-air competitor and allow WUPW to gain an unfair advantage in retransmission consent negotiations with Buckeye.³⁰ Buckeye states that WJBK is a FOX affiliate that is significantly viewed throughout Lucas, Lenawee and Monroe Counties and has been carried on the Buckeye system for over 42 years.³¹ In any event, Buckeye argues that WUPW's petition should be denied because it has failed to satisfy the standards required for a waiver of Section 76.92(f) of the Commission's rules.³² Buckeye asserts that, even if the petition demonstrated that WJBK is no longer significantly viewed in Toledo, selectively deleting portions of WJBK's signal only in the Toledo portion of its integrated system would be technically and economically infeasible and unnecessarily disrupt the long-established viewing preference of cable subscribers.³³ Moreover, Buckeye maintains that the Commission should reject WUPW's claim that it is entitled to network nonduplication protection in Toledo with regard to WJBK based on WJBK's alleged failure to satisfy the Commission's

²⁸All of the survey dates provided meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

²⁹Opposition at 1. Buckeye states that, in addition to the city of Toledo (OH0019), its Greater Toledo cable (PSID 005306) system serves 20 other cable communities in the Toledo DMA -- Perrysburg (OH0260; OH0296), Maumee (OH0290), Sylvania (OH0297), Ottawa Hills (OH0298), Springfield (OH0380), Rossford (OH0417), Monclava (OH0418), Oregon (OH0539), Washington (OH0540), Holland (OH0814), Harbor View (OH1813), Spencer (OH1814), Middleton (OH2127), Waterville (OH2484; OH2744), Northwood (OH2728), Richfield (OH2729), and Riga (MI1913) – and 5 communities in the Detroit, MI DMA – Bedford (MI2008), Whiteford (MI1056), Summerfield (MI2032), Ida (MI1057), and Lost Peninsula (MI1240).

³⁰*Id.* at 2 n.5. Buckeye argues that, in its retransmission consent negotiations, WUPW has demanded compensation for its signal at a rate almost double that received by the most-viewed broadcast station in the market. If WUPW's waiver petition is granted, Buckeye states that it will be effectively forced to comply with WUPW's demands which will, inevitably, result in higher cable rates for all of its system subscribers.

³¹*Id.* at 2. Buckeye notes that WJBK was not carried for 16 months (from May 24, 2006 through September 17, 2007) due to an impasse in retransmission consent negotiations. *See id.* at n.94.

³²*Id.* at 2-3, citing 47 C.F.R. § 76.92(f).

³³*Id.* at 3.

significantly viewed standards.³⁴ Buckeye states that WUPW's request is based on WJBK's inability to satisfy the network station criteria for significantly viewed status – 3 percent share of total weekly viewing and 25 percent share net weekly circulation.³⁵ However, Buckeye notes that, as a FOX affiliate, WJBK is considered an independent station and it is not required to meet the significantly viewed standards for a network station.³⁶

8. Buckeye contends that WUPW's petition and survey fail to comply with the requirements established in *KCST-TV* and related Commission precedents.³⁷ First, Buckeye argues that the Commission should reject WUPW's survey because it fails to provide any meaningful explanation of the methodology used to obtain the data submitted.³⁸ Buckeye states that in *Radio Perry, Inc.*, the Commission held that a "[p]etitioner's failure to provide a sufficient explanation of the submitted data requires that the [the Bureau] deny its request for waiver of the rules."³⁹ Similarly, in *Gulf California Broadcasting Company*, the Commission reiterated and clarified these requirements.⁴⁰ Buckeye states that the only explanation provided by WUPW is a short, vague and conclusory letter from Nielsen which is unintelligible without further information and does not meet the Commission's requirements.⁴¹ For example, Nielsen states that its "report is based upon a series of zip codes" but makes no attempt to explain how those zip codes were selected or to demonstrate that those zip codes accurately represent the City of Toledo.⁴² While WUPW stated that it provided Nielsen with zip codes which the U.S. Postal Service ("USPS") associated with Toledo, Buckeye argues that these zip codes do not accurately reflect the city or its residential households.⁴³ Buckeye points out that the survey includes 4 zip codes that contain only post office boxes, one zip code assigned to a U.S. Post Office, 11 "unique" zip codes assigned to corporate entities, one zip code that lies entirely outside the city's boundaries; and 5 zip codes that includes areas only partially inside the city.⁴⁴ Buckeye states that 67 of the survey's diaries (40.61 percent of the total number of diaries) are from the 5 zip codes that are only partially inside the city and that there is no demonstration that any of these diaries come from households actually within the city.⁴⁵ Buckeye maintains that neither the petition nor the survey explains whether the distribution of diaries among the purported Toledo zip codes is proportional to the population of those areas nor do they

³⁴*Id.* at 4.

³⁵*Id.*, citing 47 C.F.R. § 76.5(i).

³⁶*Id.* at 4-5. Buckeye states that the Commission's rules define a full or partial network station as one that carries "programming offered by one of the three national television networks" (*i.e.*, ABC, CBS, and NBC). *Id.* at 5, citing 47 C.F.R. §§ 76.5(j) and 76.5(k).

³⁷*Id.* at 8.

³⁸*Id.*

³⁹*Id.*, citing 11 FCC Rcd 10564, 10568 (1996).

⁴⁰*Id.* at 9, citing 21 FCC Rcd 3476, 3479 (2006).

⁴¹*Id.* at 9-10, citing Petition at Exhibit 1.

⁴²*Id.* at 10, citing Petition at Exhibit 1.

⁴³*Id.* at 10 and 13.

⁴⁴*Id.* at Exhibit 4.

⁴⁵*Id.* at 13. Buckeye states that the survey also did not include 3 other zip codes whose geographic boundaries lie partially inside and partially outside the city. *Id.* at 14.

explain how many diaries come from areas located outside of Toledo.⁴⁶ As a result, Buckeye contends, the survey fails to represent a statistically reliable sample for the City of Toledo.

9. Buckeye argues further that WUPW's petition should be denied because the survey fails to include all of the communities served by Buckeye's cable system. Buckeye notes that Section 76.54(b) of the Commission's rules allows petitioners to elect between performing a single, system-specific survey or a number of individual community-specific surveys for the various communities served by a cable system.⁴⁷ Buckeye maintains, however, that the Commission's rules should not permit WUPW to "cherry pick" a single community from Buckeye's integrated cable system, where WJBK is significantly viewed throughout, because the system is technically incapable of selectively deleting WJBK's network programming in only the Toledo portion of the system.⁴⁸ Buckeye states that Section 76.54(b) requires that "[i]f a cable television system serves more than one community, a single survey may be taken, provided that the sample includes non-cable television homes from each community that are proportional to the population."⁴⁹ Buckeye points out, however, that the Commission has stated that it expects petitioners to include a "community-based viewership survey, taken on the basis of the entire cable system" as opposed to submitting a community-specific survey for only one of many cable communities served by a system where the station is significantly viewed.⁵⁰ Buckeye states that WUPW provides no data for any of the other communities served by its integrated system and has therefore failed to demonstrate that WJBK is not significantly viewed.⁵¹ Given the commercial impracticability of deleting WJBK's programming in a single franchise area, Buckeye argues that WUPW should be required to include all of the Buckeye cable system communities where WJBK is considered significantly viewed.⁵² Buckeye maintains that if required to selectively blackout WJBK's signal solely from the Toledo, the cost of rebuilding the system to accomplish this would be approximately \$3,785,244.⁵³ Buckeye asserts that imposing such costs would constitute an undue financial burden and it points out that the Commission has previously recognized instances where the demonstrated costs of compliance have been shown to be prohibitive.⁵⁴

⁴⁶*Id.* at 14.

⁴⁷*Id.*, citing 47 C.F.R. § 76.54(b).

⁴⁸*Id.* at 15.

⁴⁹*Id.*, citing 47 C.F.R. § 76.54(b).

⁵⁰*Id.*, citing *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, Second Report and Order*, 3 FCC Rcd 2671, n.24 (1988) ("Second Report and Order").

⁵¹*Id.* at 15-16.

⁵²*Id.* at 16 and 24-27. Buckeye states that its Greater Toledo area cable system is an integrated network serving 26 contiguous franchise areas and is designed around 13 physical hub sites, each of which serves a segment of the cable system. Its distribution network, however, is generally not technically capable of providing individualized programming to a single franchise area, but instead can only provide individualized programming to each of the system's 13 hubs.

⁵³*Id.* at 25 and Exhibit 7.

⁵⁴*Id.* at 25, citing *Buckeye Cablevision, Inc.*, 8 FCC Rcd 7944 (1993). In this instance, Buckeye argues that the compliance is not only technically problematic due to the inherent design of its integrated system, but the actual costs of compliance is more than 315 times greater than the upper range of costs that the Commission previously determined would not be burdensome. See e.g., *CTV of Derry, Inc.*, 18 FCC Rcd 19272 at para. 9 (2003).

10. Buckeye also contends that the survey provided by WUPW fails to provide an accurate standard error as required by the Commission's rules.⁵⁵ Buckeye states that the Commission has always relied on a properly calculated standard error as a means to quantify the accuracy of a sample, but Buckeye argues that a standard error is useful only when it is based on a properly selected representative sample of sufficient size.⁵⁶ In WUPW's survey, Buckeye asserts that the standard error is unreliable because it is not based on such a representative sample and because it does not incorporate all relevant sources of error – the survey reported no viewers tuning to WJBK during the relevant periods in 2007 and further reported a “cume standard error” of zero and a “share standard error” of zero for this result.⁵⁷ Buckeye contends that this conclusion is patently implausible and such flawed survey methodologies cannot be accepted as accurate when their results are irreconcilable with reality.⁵⁸ Moreover, Buckeye argues that the survey reflects other inaccuracies that neither Nielsen nor WUPW have addressed despite the fact that Nielsen has conceded that other sources of error affect the quality of the data it provides.⁵⁹ For instance, Buckeye notes that Nielsen has improperly included non-viewer diaries in the survey, decreasing reported viewing rates and rendering the survey unreliable for its intended showing.⁶⁰ In addition, Nielsen has acknowledged that its audience data is potentially subject to many types of errors other than sampling.⁶¹ Given the 85 percent household penetration that cable, DBS, and other non-broadcast programming distributors have achieved in the Toledo DMA, Buckeye submits that over-the-air viewers are a low audience segment. It therefore asserts that the Commission should require that petitioners seeking a waiver of the significantly viewed rules provide “precise audience estimates” acquired through special studies of over-the-air viewing rather than re-tabulated general information that Nielsen concedes “should not be interpreted as meaningful.”⁶² Buckeye states that the survey is also unreliable because neither Nielsen nor WUPW have disclosed whether WUPW, or any other stations, conducted any activity during the relevant sweep periods that could have affected the survey's accuracy.⁶³ Buckeye argues further that significant regulatory decisions, such as here, cannot rationally be based on Nielsen's inherently unreliable and subjective diary system.⁶⁴ Instead, Buckeye contends, the Commission should require the use of electronically metered viewing data and larger sample sizes in significantly viewed waiver cases.⁶⁵ Finally, Buckeye points out that in *KCST-TV* the Commission determined that a petitioner may obtain a waiver of Section 76.92(f) of the rules by demonstrating that it

⁵⁵*Id.*

⁵⁶*Id.* at 16-17, citing *Radio Perry*, 11 FCC Rcd at 10569.

⁵⁷*Id.* at 17, citing Petition at Exhibit 1.

⁵⁸*Id.*

⁵⁹*Id.* at 18.

⁶⁰*Id.*

⁶¹*Id.* at 19. Buckeye states that the types of errors listed are: 1) “response error” – errors caused by inaccurate reporting of viewing; 2) “non-response error” – the inability to secure usable data, or any data at all, from all households in the predesignated sample; and 3) “sampling and non-sampling error on low-level audience data” – often are equal to or greater than the reported audience level.

⁶²*Id.* at 19-20, citing *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969); *see also* Petition at Exhibit 1.

⁶³*Id.* at 21.

⁶⁴*Id.*

⁶⁵*Id.*

will suffer harmful economic impact should such a waiver be denied.⁶⁶ In this instance, however, Buckeye states that WUPW has provided no evidence that it has or will suffer any economic harm due to WJBK's presence and, as a result, its petition should be denied.

11. In reply, WUPW admits that it incorrectly referred to viewership standards for network affiliate stations in its petition, but it argues that this error does not otherwise affect the data it submitted in support of its request.⁶⁷ WUPW states, therefore, that it proved that WJBK no longer meets the significantly viewed standards in Toledo, using standard, re-tabulated Nielsen data and methodology.⁶⁸ WUPW points out, however, that the bulk of Buckeye's opposition is, apparently, an attempt to re-argue not only the settled Commission precedent related to waivers of Section 76.92(f) of the rules, but Nielsen's methodology as well.⁶⁹ WUPW states that Buckeye also attacks WUPW's motives for filing the instant petition – an argument which is immaterial given the long history of Commission decisions which recognized the public interest benefits of a network's exclusive right to network programming in its local market.⁷⁰ Moreover, WUPW contends that, despite Buckeye's claim that it has carried WJBK for 42 years, its concession that it did not carry the station for 16 months due to a retransmission consent dispute brings into question the value of WJBK's programming to the cable system.⁷¹

12. WUPW maintains that it has fully satisfied the Commission's clear and consistent standards for seeking a waiver of Section 76.92(f) of the rules.⁷² While Buckeye has argued that WUPW failed to show that its waiver request would serve the public interest, WUPW points out that in *KCST-TV*, the Commission determined that a waiver of Section 76.92(f) would be in the public interest.⁷³ Similarly, WUPW argues that there is no requirement that it show economic harm in order to obtain such a waiver, only that it demonstrate for two consecutive years that a station is no longer significantly viewed.⁷⁴ In addition, WUPW asserts that Sections 76.54(a) and 76.92(f) of the Commission's rules allow it to seek a waiver for one community, even if that community is served by a larger, integrated cable system.⁷⁵ Indeed, WUPW notes that the Commission stated that it did "not agree that identical signal carriage ought to be permitted throughout all portions of any technically-integrated [cable] system regardless of the applicable signal carriage rules."⁷⁶ Moreover, in *WTNH Broadcasting, Inc. and K-W*

⁶⁶*Id.* at 23, citing *KCST-TV*, 103 FCC 2d at 413.

⁶⁷Reply at 1 n.1.

⁶⁸*Id.* at 1-2.

⁶⁹*Id.* at 2.

⁷⁰*Id.* at 2-3, citing *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, 20 FCC Rcd 27278, 17283 (2005) ("*SHVERA Order*").

⁷¹*Id.* at 3, citing Opposition at 26 n.94.

⁷²*Id.* at 4, citing 47 C.F.R. § 76.92(f).

⁷³*Id.*, citing 103 FCC 2d at 413. See also *Flint License Subsidiary Corp.*, 21 FCC Rcd 653, 656 (2006) ("[W]e find that a grant of the significantly viewed exception from the network nonduplication rules with regard to the community-specific survey for the community of Flint, Michigan, will serve the public interest.").

⁷⁴*Id.*

⁷⁵*Id.* at 5, citing 47 C.F.R. §§ 76.54(a) and 76.92(f).

⁷⁶*Id.* at 6, citing *Amendment of Part 76 of the Commission's rules and Regulations with Respect to the Definition of a Cable Television Systems and the Creation of Classes of Cable Systems*, 63 FCC Rcd 956, 967 (1977).

TV, Inc., the Commission granted a waiver for a situation similar to that herein.⁷⁷ WUPW argues that Buckeye's interpretation of the rules would eliminate the difference between a community-specific and a system-wide survey.⁷⁸ Further, WUPW maintains that the application of the network nonduplication rules does not vary depending on either the expense of compliance or the cable system's technological configuration.⁷⁹ Indeed, WUPW states that, even if compliance would be as expensive as Buckeye has claimed, it has represented to the Commission and to WUPW that it has already purchased the equipment needed to comply with the network nonduplication rules in the Wood County portion of its system where WJBK has never been considered to be significantly viewed.⁸⁰ WUPW argues that Buckeye therefore cannot claim that there is a material difference between the Wood County and Toledo portions of its system.⁸¹ In any event, WUPW states that Buckeye ignores the economic loss that WUPW incurs due to its inability to assert its exclusive rights in its home community.⁸²

13. In addition, WUPW argues that, despite Buckeye's arguments, the survey methodology presented herein was explained clearly in the petition and the attached letter from Nielsen.⁸³ WUPW states that this is the standard format used for petitions seeking waiver of the "significantly-viewed" exception to the network nonduplication rules and it is a format that the Commission has routinely accepted.⁸⁴ WUPW maintains that Buckeye's reliance on the Commission's decisions in *Radio Perry* and *Gulf-California I* is misplaced as the petitioners in those cases used non-standard surveys that lacked any clear explanation of methodology.⁸⁵ WUPW points out, however, that in other Commission decisions where the waiver request was granted, the petitions all included letters from Nielsen similar to the one included herein.⁸⁶ WUPW notes further that Nielsen survey data is organized geographically by zip code and community-specific surveys relating to "significantly-viewed" status use zip codes as a proxy to determine which diaries fall within the relevant community.⁸⁷ WUPW states that it was therefore appropriate for it to use information from the U.S. Postal Service and other commercial sources to create a list of zip codes that fall within or partially within the city of Toledo and for Nielsen to use this list to re-tabulate its existing survey data.⁸⁸ While the use of zip codes may not be a perfect proxy,

⁷⁷*Id.*, citing 16 FCC Rcd 16377 (2001).

⁷⁸*Id.*, citing *SHVERA Order*, 20 FCC Rcd at 17290 ("Section 76.54 provides that parties may demonstrate that signals are significantly viewed either on a county-wide basis or on a community-basis.").

⁷⁹*Id.* at 7, citing Opposition at 23; *see also WTNH*, 16 FCC Rcd at 16380.

⁸⁰*Id.*, citing Opposition at 4 of Buckeye Cablevision to WUPW's "Complaint for Enforcement of Network Non-Duplication Protection" (CSR-7848-N).

⁸¹*Id.*

⁸²*Id.* at 7-8. WUPW states that Buckeye is entitled to use its existing headend infrastructure to remove FOX programming from WJBK with respect to the headends serving any part of the Toledo community – the expense of which would likely be minimal.

⁸³*Id.* at 8.

⁸⁴*Id.*

⁸⁵*Id.* at 9, citing Opposition at 11.

⁸⁶*Id.*, citing *Meredith Corporation*, 22 FCC Rcd 12932 (2007); *Barrington Broadcasting Flint Corp.*, 19 FCC Rcd 22046 (2004); *MMM License LLC*, 17 FCC Rcd 20875 (2002).

⁸⁷*Id.* at 10.

⁸⁸*Id.*

WUPW maintains that it has become the standard means of identifying those Nielsen diaries that compose the community-specific survey; a standard which has been upheld by the Commission.⁸⁹ WUPW argues that Buckeye's contention that some of the included zip codes lacked any residential households is irrelevant because they would have produced no Nielsen household diaries and, as a result, would not affect the resulting data.⁹⁰ Moreover, despite Buckeye's assertions, WUPW states that the Commission's rules do not require that the distribution of diaries used from each zip code be proportional by residential population, but only that the overall diaries fairly represent the community.⁹¹ WUPW states that Nielsen's cover letter and data also clearly show the derivation of the standard error it employed here, which is the same methodology used by Nielsen in similar surveys accepted by the Commission.⁹² WUPW maintains, in conclusion, that not only does the Commission routinely accept Nielsen data and calculations with regard to standard error calculations based on smaller numbers of diaries than was the case here, but it routinely grants waivers of Section 76.92(f) based on such Nielsen's calculations.⁹³

III. DISCUSSION

14. We find that WUPW made the requisite showing to support its petition. As required by the rules, WUPW has provided community-specific survey results for the City of Toledo for each year surveyed. The showings are for two four-week survey periods in each of two years for WJBK. For the first year, the submitted data show that for the May 2006/November 2006 audience sweep periods, combined, with the standard errors added, WJBK attains a 0.076 percent share of total weekly viewing hours (0.038 reported share + 0.038 standard error) and a 1.47 percent average net weekly circulation share (0.73 reported share + 0.74 standard error). For the second year, the submitted data for the May 2007/November 2007 audience sweep periods, combined, WJBK attains no measurable audience shares. FOX affiliates are considered independent stations for the purposes of determining whether a station is significantly viewed. Independent stations, therefore, must attain a 2 percent share of total weekly viewing hours and a 5 percent net weekly circulation share. In this case, for both years, WJBK does not meet these criteria and we conclude that WJBK is no longer significantly viewed in Toledo, Ohio.

15. Buckeye has raised numerous arguments in this proceeding ranging from survey methodology to technical and economic issues. We will take them in turn. First, we disagree with Buckeye's assertion that WUPW failed to provide a substantive explanation of its survey methodology. The survey data submitted by WUPW contains a cover letter from Nielsen which provides a description of its methodology. Specifically, this letter explained how Nielsen selected the households in its Nielsen Station Index database using the zip codes provided by the petitioner; detailed its weighting procedures and its methodology for calculating the standard errors for each estimate. The format and descriptions

⁸⁹*Id.*, citing *KSWB, Inc.*, 13 FCC Rcd 15470 at para. 15 (1998) ("KCOP's criticism that the survey improperly relied on . . . identification of the communities served by zip codes is rejected.").

⁹⁰*Id.* at 10-11. WUPW states that the same would be true for any zip codes that falls completely outside the City of Toledo.

⁹¹*Id.* at 11, citing *Gulf-California Broadcast Company*, 23 FCC Rcd 7406, 7409 (2008) ("Nielsen re-tabulates the over-the-air data that it collects for its routine audience sweep periods, selecting in-tab diaries from its database from the . . . individual cable community [based on zip code].").

⁹²*Id.* at 11.

⁹³*Id.* at 12. WUPW notes that there is no evidence to support Buckeye's claim that WJBK's extremely low viewership levels were somehow skewed by ongoing contests or other special events.

contained in Nielsen's letter are consistent with the Commission's well-established precedent for such submissions. Second, while Buckeye maintains that the number of diaries on which the survey data is based fails to represent the nearly 129,000 households in Toledo, we note that Section 76.54(b) of the Commission's rules does not specify a minimum number of survey households and, indeed, many significant viewing showings are based on substantially smaller sample sizes. Moreover, we require petitioners to provide the standard errors about any reported average audience shares. These statistical computations provide a means of assessing the reliability of any estimate and take into account the sample size. Therefore, the samples used by Nielsen herein are more than sufficient to demonstrate that WJBK no longer meets the criteria for significantly viewed status. Third, we agree with WUPW on its reliance on *KSWB, Inc.* in support of the use of zip codes as proxies for the identification of the community where the waiver is sought even though, unlike here, the opposing party did not challenge the correctness of the list of zip codes used.⁹⁴ Buckeye challenges some of the zip codes selected by WUPW, but we believe, after review, that WUPW has provided a reasonable explanation for its choice and its effect on the survey results.⁹⁵ In this instance, WUPW stated that neither the zip codes that do not include residential households nor the zip codes that fall outside Toledo provided in-tab households so the overall results were unaffected. We recognize that it is difficult to exactly match the geographic area covered by Buckeye's system in Toledo, but we conclude that the procedures used by WUPW appear to provide a reasonable representation of the community for this purpose. Moreover, in light of the small viewing shares and associated standard errors, it is unlikely that the inclusion or exclusion of a few additional zip codes would measurably affect the statistical results. Fourth, despite Buckeye's contention, WUPW's decision to demonstrate that WJBK is no longer significantly viewed in only one community is consistent with Commission precedent and the procedures established in the Commission's rules and *KCST-TV*. Fifth, while Buckeye asserts that there is no explanation of the distribution of the diaries among zip codes to show that they are roughly proportional to the populations of those areas, we find that Buckeye misinterprets this requirement in this instance. The proportionality requirement referred to by Buckeye only applies to a system-specific survey and not to a community-specific survey where zip codes are used to identify addresses that should be included in Nielsen's re-tabulation of its in-tab households. Where a petitioner elects to undertake community-specific surveys, rather than a system-specific survey, proportionality among the communities served by the system is not required because each survey is performed independently.

16. The additional arguments raised by Buckeye attacking Nielsen's methodology, particularly the manner in which it has been adapted to allow petitioners to demonstrate whether a station is significantly viewed, are also rejected. Buckeye argues that the standard error included in the survey is unreliable because it is not based on a properly selected representative sample and does not incorporate all relevant sources of error. However, we note that the purpose of calculating a standard error is to allow us to place a "confidence limit" around the estimate, a statistical methodology for assessing the reliability of the estimate within a specified probability that takes into account both the reported audience estimate and the sample size. Buckeye again points to the small sample size compared to the number of households in Toledo and claims that the survey includes non-viewer diaries. While it is true that the sample herein is small, it should be noted that it is intended to represent the non-cable/non-ADS households, a subset of all households in the community.⁹⁶ Moreover, with respect to non-viewer diaries,

⁹⁴See 13 FCC Rcd 15470 (1998).

⁹⁵See Reply at 10-11.

⁹⁶Given the type of survey being conducted, small samples can represent much larger populations. In this case, the 79 in-tab households referenced as the sample size for the 2007 surveys, represent not all TV households in Toledo, but only over-the-air TV households. For example, based on the most recent data we have for Lucas

(continued...)

it is possible that surveyed households did not watch television during the survey period and including such in-tab households is relevant for assessing over-the-air viewing in the community. Finally, the litany of sampling and associated errors referred to by Buckeye from Nielsen's publications explaining its general surveys and the known imperfections of sampling need not be of concern. We have found that Nielsen's data, re-tabulation methodology, and calculations provide a reasonable estimate of over-the-air viewing and there is no reason to reject its independent expert judgment based on the arguments raised by Buckeye.⁹⁷

17. With regard to the other arguments raised by Buckeye, we note, initially, that despite its contention, a grant of WUPW's waiver would not automatically require Buckeye to delete WJBK entirely from carriage within the city of Toledo, but only the FOX network programming for which WUPW has network exclusivity rights. However, we note that because Buckeye's technically-integrated cable system serves communities located in both the Detroit, Michigan and Toledo, Ohio DMAs, rendering both WUPW and WXYZ-TV must carry stations, Buckeye could elect to delete whichever of the two FOX affiliates is farthest from its principal headend.⁹⁸ Second, despite Buckeye's speculations as to WUPW's motives in seeking the instant waiver, WUPW is well within its rights to assert its exclusivity rights within the Toledo DMA. Third, while Buckeye maintains that WUPW did not meet the waiver standards of Section 76.92(f) because it failed to demonstrate that it will suffer any economic harm absent the requested waiver, it should be noted that in *Report and Order in Gen. Docket No. 87-24*, the Commission eliminated its policy of granting waivers of the nonduplication rules based upon a showing of no significant harm to the local broadcaster.⁹⁹ Accordingly, it is not a requirement for demonstrating that a waiver should be granted. Fourth, we consider WUPW's reference to the network significantly viewed criteria as inadvertent, an error that did not materially affect the survey data it provided or its satisfaction of the waiver standard for independent stations.¹⁰⁰

18. Buckeye claims that it will be technically infeasible for it to black out the network programming for WXYZ-TV only in the Toledo portion of its technically-integrated system.¹⁰¹ After evaluating Buckeye's cost analysis, however, we are unable to determine the reasonableness of the costs that Buckeye would incur. In its request for waiver, Buckeye has merely introduced a laundry list of costs. It has provided no information about per subscriber costs and what impact such costs would have on its system's ability to serve its subscribers. Moreover, Buckeye's representations lack sufficient specificity to determine if the projected costs have been arrived at through sound engineering practices.

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County, where Toledo is located, these households only represent 16.8 percent of the 179,220 TV households in the county. See The Nielsen Company, *Media Related Universe Estimates by County Within DMA*, April 23, 2009. In addition, Buckeye misinterprets the meaning of the reported audience of zero. It does not necessarily mean that not one household viewed WJBK, but rather that when the reported viewing is converted to an audience share, the result is below Nielsen's reporting minimum.

⁹⁷ Buckeye's arguments and suggestions in regard to changing the criteria governing exclusivity waiver requests raise issues beyond the scope of this petition. Should the Commission wish to revise its long-established procedures for significant viewing showings, it could only be done through the Commission's rulemaking process.

⁹⁸ See n.3, above.

⁹⁹ See 3 FCC Rcd 5299, 5320 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

¹⁰⁰ In any event, WUPW corrected this mistake in its Reply.

¹⁰¹ See *supra* n.4.

In this regard, Buckeye has provided no information to allow us to evaluate its engineering analysis. Without specific information regarding how Buckeye's system distributes its programming, such as subscribers per node, or the layout of its network relative to the affected areas, we are unable to determine if the costs to reconfigure its system, absent a waiver, are unreasonable. Further, Buckeye has provided no alternatives to their stated method such as the use of frequency traps, the reassignment of subscribers from one node to another, the deployment of addressable set-top boxes, or other methods which might be employed. In sum, we simply lack sufficient data to evaluate Buckeye's cost analysis. Lastly, we note that large, integrated systems like Buckeye's, by their very nature, have a large footprint which will be subject to various nonduplication obligations as a result of their chosen distribution architecture.

19. Accordingly, we find that the submitted audience surveys are sufficient to show that WJBK no longer attains the viewing levels needed to demonstrate significantly viewed status in the City of Toledo, Ohio, and we grant WUPW's request.

IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, that the petition filed by WUPW Broadcasting, LLC **IS GRANTED**.

21. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁰²

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

¹⁰²47 C.F.R. §0.283.